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No. 691

In the Supreme Court of the United States

OCTOBER TERM, 1967

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

HOTEL, MOTEL AND CLUB EMPLOYEES UNION, LOCAL 6

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Secretary of Labor, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on September 22, 1967.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 17–32) is reported at 381 F. 2d 500. The orders of that court denying the Secretary's petition for rehearing and suggestion for rehearing *en banc* (App. C, *infra*, pp. 35–36) are unreported. The opinion of the district court (App. E, *infra*, pp. 42–68) is reported at 265 F. Supp. 510; an earlier opinion of that court striking portions of the complaint (App. D, *infra*, pp. 37–41) is unreported.

JURISDICTION

The decision of the court of appeals (App. A, *infra*, p. 17) was rendered on July 28, 1967. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on September 20, 1967 (App. C, *infra*, p. 35). Final judgment (App. B, *infra*, p. 33) was entered on September 22, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a union rule severely restricting the eligibility of members to become candidates for executive office—here a requirement of prior service in the union's legislative body—may be deemed a "reasonable" qualification under the Labor-Management Reporting and Disclosure Act of 1959, notwithstanding the unusual character of the rule and the finding that it effectively eliminates dissident candidates.

2. Whether a candidacy qualification "may have affected" the outcome of a union election within the meaning of the Act when it resulted in the disqualification of several nominees for union office and rendered approximately 93 percent of the membership ineligible to run for office.

3. Whether, when a complaint has been presented to the Secretary of Labor, he may allege violations which are disclosed by his investigation of the complaint, even though they were not charged in the union member's protest to the union.

STATUTE INVOLVED

The pertinent provisions of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. 401 *et seq.*, are printed in App. G, *infra*, pp. 71–78.

STATEMENT

1. Respondent local union represents bartenders, maids and kitchen and dining-room help employed by hotels, motels and clubs in New York City (App. 85a–87a).[1] The local, whose membership exceeds 27,000 (App. 57a–58a), is divided into geographical districts which elect delegates to the Assembly. Although described by the union's bylaws as its highest body (App. 271a), in actual practice the Assembly has served merely to approve reports and policies of the union's officers and executive board. The President of the union could not recall one instance in recent years in which the Assembly disapproved any action of the executive board (App. 94a). The Assembly usually meets only four times a year, three meetings lasting no more than two or three hours, the fourth for an entire day (App. 271a, 283a). Attendance at Assembly meetings is poor (App. 281a). Some Assembly members serve on negotiating committees and other bodies within the union which play a more active role in union affairs (App. 124a–128a). The only group to which all 400-odd members of the Assembly belong is the district council in each district, and this is a forum for internal union discussions

[1] "App." refers to plaintiff-appellant's appendix in the court of appeals.

rather than an organ of actual union government or administration (App. 127a–128a).

The Assembly, which has almost 400 members (App. 127a), consists of one representative for every 75 members of the union (App. 265a). The officers of the union are *ex officio* members (App. 263a, 266a). The by-law restriction here in issue provided that in order to be eligible to run for union office the candidate must have been a member of (a) the Assembly, (b) the executive board, or (c) the Shop Delegates Council (the legislative body of the union prior to 1951) (App. 269a).

Since 1951, when the present organization of the union was established, the Administration Party has controlled the union and the Assembly (App. 101a–105a). During this period, the Administration Party has always run a full slate for the Assembly, and every candidate on that slate has won in each election (App. 101a–105a). As the district court explained (App. E, *infra*, p. 53):

> In practice it was not possible to be elected to the Assembly except with the blessing of the Administration Party conferred by selection to run for the Assembly on Row A. This was doubtless in large part because there was never a full slate of opposing candidates for the Assembly. The candidates to run on Row A for the Assembly were selected by the incumbent group of officers and were put in nomination after caucuses of invited members, attended by officers. It was only natural that candidates selected to run on Row A for the Assembly would be supporters of

> the administration. All candidates on Row A were pledged to support each other. Dissidents could not be elected to the Assembly.

Thus, the district court found, "dissidents could not become eligible to be opposing candidates for office and effective opposition was thus sharply curtailed" (App. E, *infra,* p. 62).

In 1965, for the first time in 14 years, the Administration Party faced organized opposition in an election. A group calling itself the Membership Party nominated members to run for the four general offices—president, general organizer, secretary-treasurer and recording secretary (App. 249a, 273a), and also put up candidates for 13 of the 27 additional executive positions within the union to be elected from the various districts. However, of the four Membership Party nominees for general union office, one—the nominee for secretary-treasurer—was ruled ineligible because he did not meet the prior office-holding requirement, as were seven of the 13 Membership Party candidates for district office (App. 250a, 273a). The consequence was that the Membership Party ran candidates for only four of the 31 principal offices in the 1965 election—president, general organizer and business agent in two districts (App. 275a)—while the administration ran a full slate (App. 275a). About 40 percent of the eligible membership voted at the election (App. 57a, 58a, 275a) and the entire administration slate won. Where administration candidates were opposed they won by margins of approximately 7 to 1 (App. 101a, 275a).

2. The Labor-Management Reporting and Disclosure Act of 1959 directs the federal district court, at the suit of the Secretary of Labor acting upon the complaint of a union member, to set aside a union election and order a new election under the supervision of the Secretary if the court finds that the Act was violated and that the violation "may have affected the outcome" of the election (Section 402(c), 29 U.S.C. 482(c)). This action was brought by the Secretary, on the complaint of a member of Local 6, to set aside the union's May 1965 election and to direct a supervised election. The Secretary alleged that the union had violated Section 401 of the Act, which provides that every member in good standing shall be eligible to be a candidate for and hold office, subject only to "reasonable qualifications" (App. 4a).

After trial, the district court held that the rule restricting candidacy to prior members of the Assembly was a violation of the Act. The court found that the effect of the rule was to curtail opposition, because in practice only candidates on the administration ticket could be elected to the Assembly (App. E, *infra,* pp. 62–63). Moreover, the court noted that under the union rules an officer could be appointed to fill a vacancy although he did not satisfy the eligibility requirement for election to office. Thus, the court found, "once such an officer is appointed, he automatically becomes a member of the Assembly and immediately becomes eligible to run thereafter for any union office. This enables the incumbent group to qualify members for elective office by a procedure not available to dissi-

dents" (App. E, *infra,* pp. 62–63). The court rejected the attempt of the union to justify its rule on the ground that the complexity of union problems requires that officers have some experience in union affairs: "the premise [is] that the membership at large cannot be trusted properly to evaluate union experience in casting election ballots. The philosophy of a free democratic society, expressed in the Act, does not tolerate such a premise" (E, *infra,* p. 61).

The district court, however, refused to order a supervised election, on the ground that it could not find that the violation of the Act "may have affected the outcome" of the union's 1965 election (App. E, *infra,* pp. 63–65). Although application of the prior office-holding requirement caused the disqualification of nine candidates, the court noted that there was, nevertheless, a contested election at which the Membership Party ran opposing candidates for president and nine other offices. Since all of the Membership Party candidates who were allowed to run lost by margins of 7 to 1 or better, the district court concluded that the presence of the disqualified nominees on the slate would not have changed the result. In its view, the Membership Party's failure at the rolls resulted from its lack of any "dramatic or important issue to rouse the membership against the incumbents" (App. E, *infra,* p. 65) and its failure to run a full slate of candidates for the Assembly.

The court of appeals upheld the district court's refusal to order a supervised election, but for different reasons. The majority of the court of appeals ruled

that the prior office-holding requirement was lawful, commenting that: "It does not seem to us to be surprising that the union should hesitate to permit a cook or a waiter or a dish-washer without any training or experience in the management of union affairs to take on responsibility for the complex and difficult problems of administration of this union" (App. A, *infra*, p. 24). The concurring judge thought that the district court's findings as to the effect of the rule in curtailing opposition—not alluded to by the majority—established the unreasonableness of the requirement, but accepted the district court's refusal to find that the outcome of the election might have been affected thereby (App. A, *infra*, pp. 28–32).

3. The Secretary's complaint had alleged three violations in addition to application of the prior office-holding rule: failure to give adequate and timely notice of the composition of election districts, improper interference with the members' right to vote for and support candidates, and failure to fill certain union offices by election (App. 6a). The district court struck these allegations from the complaint, on the ground that the union member had not protested the additional violations in the internal complaint which triggered the proceeding (App. D, *infra*). At trial, the Secretary offered to prove that, prior to bringing this suit, officials of the Department of Labor called the union's attention to two of the three additional violations (App. 115a–119a). The district court, however, excluded the evidence and declined to change its ruling limiting the scope of the complaint (App. 120a, 233a–235a). The court of appeals agreed, on the

ground that no member of the union had filed with the Secretary a complaint addressed to the additional violations specified in the Secretary's suit. The court rejected the Secretary's argument that he has a duty in enforcing the statute to protect the public interest, ruling that the Secretary's only function is to act as the "union member's lawyer" and that he may, therefore, only litigate points initially raised by a union member (App. A, *infra*, p. 27).

REASONS FOR GRANTING THE WRIT

1. The case raises an important question in the administration of Title IV of the Labor-Management Reporting and Disclosure Act of 1959—the extent to which a union remains free to restrict the right of its members to run for elective office by imposing narrowly restrictive candidacy qualifications, and, specifically, whether a requirement of prior office-holding is "reasonable" under the Act when it severely curtails the opportunity to elect opposition candidates. Although no direct conflict among circuits has yet arisen on the legality of the type of qualification here involved, the decision below represents a significant departure from the approach of most courts and a prompt and authoritative answer is necessary in view of the volume of litigation under the Act and the fundamental character of the question.[2] The concept

[2] The decision of the court of appeals has already been followed by one district court (*Wirtz* v. *Local 174, American Federation of Musicians*, 272 F. Supp. 294 (E.D. La.)), and may prove dispositive of the Secretary's pending action against the National Maritime Union in the Southern District of New York (Civil Action No. 66 Civ. 4519).

of reasonable qualifications is indeed central to the electoral provisions of the Act.

In determining whether a particular eligibility rule is a "reasonable qualification" it would seem obvious that the justification offered by the union must be weighed against the plain intent of the statute to afford a wide opportunity for union members to run for office, must be related to the practice of comparable organizations with elective officers, including other unions, and must be tested by its actual effect. That has been the approach followed by the Secretary of Labor, to whose "special knowledge and discretion" questions arising under Title IV are entrusted in the first instance (see *Calhoon* v. *Harvey*, 379 U.S. 134, 140), and these criteria have generally been applied by other courts—including the district court in the instant case—in ruling on the validity of restrictions on candidacy.[3] Yet, in the decision below, the majority of the court of appeals simply accepted respondent's asserted need to limit candidacy to those with experience and training in union affairs, without giving consideration to the unusual character of the chal-

[3] See, *e.g.*, *Goldberg* v. *Amarillo General Drivers, etc., Local Union No. 577*, 214 F. Supp. 74 (N.D. Tex.); *Wirtz* v. *Local Unions No. 406, etc., International Union of Operating Engineers*, 254 F. Supp. 962 (E.D. La.); *Wirtz* v. *Local 153, Glass Bottle Blowers Association*, 244 F. Supp. 745 (W.D. Pa.), vacated on other grounds, 372 F. 2d 86 (C.A. 3), certiorari granted, 387 U.S. 904; *Wirtz* v. *Local Unions No. 9, etc., International Union of Operating Engineers*, 254 F. Supp. 980 (D. Colo.), affirmed, 366 F. 2d 911 (C.A. 10), vacated as moot, 387 U.S. 96; *Wirtz* v. *Local 30, International Union of Operating Engineers*, 242 F. Supp. 631 (S.D.N.Y.), vacated on other grounds, 366 F. 2d 438 (C.A. 2).

lenged candidacy rule, in other local unions and elsewhere, or to its very substantial practical impact here.

In declaring that all union members in good standing were entitled to run for union office and to vote in union elections, subject only to "reasonable qualifications," Congress may well have barred any requirement of prior office-holding since—unlike a requirement related to age, length of membership in the union, or a clean criminal record—it is bound to disqualify the majority of the membership. So drastic a curtailment of democratic opportunity seems hard to square with the clearly expressed premise of Title IV: the desirability of "assuring democratic procedures in labor unions" and achieving "a revitalization of the democratic processes of labor unions." *Interim Report of the Select Committee on Improper Activities in the Labor or Management Field,* S. Rep. No. 1417, 85th Cong., 2d Sess., p. 452. Whatever the view of an earlier day, it is today accepted that onerous office-holding requirements have little or no place in a democratic electoral process. Radically limiting the field of possible candidates greatly impairs choice and opens the door to facile ways for the inside group to maintain control. It seems inconsistent with the objective of Title IV, which was to afford union members a "real opportunity to nominate opposing candidates." 105 Cong. Rec. 885 (remarks of Senator Kennedy).

The Secretary of Labor has not, however, gone so far in his administration of the Act. Nor is it neces-

sary, for present purposes, to argue that *no* prior office-holding requirement can ever be deemed reasonable under Title IV. It is enough to suggest that such a candidacy qualification must be scrutinized with great care and that the burden is on the proponents of the rule to justify the need for it. Tested by that standard, the requirement at bar falls short. It is not common in labor union experience.[4] As applied here, the rule disqualified more than 93% of the local's 27,300 members. And, what is more, on the basis of a careful analysis (App. E, *infra*, pp. 53, 62) fully supported by the record (App. 100a–105a, 250a–251a, 253a–254a, 256a–257a), the district court in this case found that the only members who could comply with the union's requirement of prior office-holding were those favored by the incumbents—this because, as a practical matter, only candidates for the Assembly who appeared on the administration slate were elected to the Assembly and hence eligible, under the union's rules, to run for executive office. This finding was not

[4] A study of the larger unions which was introduced in evidence showed that none of the 95 national and international unions whose membership exceeds 20,000 imposed a constitutional requirement that candidates for local union office have prior office-holding experience (App. 225a–227a, 229a–231a). One international union, the International Ladies' Garment Workers Union, has a constitutional provision limiting paid officerships in the locals to those who either have had previous union office experience or who have completed a training course. Only 32 of the 125 largest locals (those with 900 or more members) affiliated with the same International as respondent had any such requirement (App. 220a, 221a). And of the 66 local unions reporting receipts of over one million dollars in 1964, only respondent limited candidacy to prior office-holders with no alternative basis for qualification (App. 229a–230a).

disturbed by the court of appeals. Its ruling sustaining the requirement of prior office-holding thus amounts to a blanket endorsement of such restrictive rules—a view wholly at odds with the scheme of the Act.

The court of appeals stated: "It does not seem to us to be surprising that the union should hesitate to permit a cook or a waiter or a dish-washer without any training or experience in the management of union affairs to take on responsibility for the complex and difficult problems of administration of this union." (App. A, *infra*, p. 24.) But if, as we contend, the object of Title IV is to inject democratic processes into the management of union affairs, it does seem surprising that cooks, waiters and dishwashers should be barred on such a ground from running for office in their own union, when we remember that inexperienced individuals are perfectly free to seek political offices far more demanding and responsible than the offices at stake in a union election. A presumption that lack of prior office-holding establishes incapacity to seek executive office is opposed to accepted notions of democratic process.

Even on its own terms, the asserted justification fails. Former members of the old Shop Delegates Council who had not held that or any other office for at least 14 years were nonetheless eligible candidates for executive office—indeed, 1182 of the 1725 eligible candidates satisfied the requirement of prior office-

holding in this fashion.[5] Moreover, to fill vacancies union officials could appoint members of the union who had never satisfied the requirement of prior office-holding. Even if restricting candidacy to individuals with previous official experience could commend itself to the democratic ideals of the Act, the requirement in suit here is not reasonably designed to exclude the inexperienced. That is additional reason why, in our view, it should not be sustained.

2. This case raises two other issues of major importance in the administration of Title IV. The first is whether a candidacy requirement which disqualifies more than 90 percent of the union membership and among them several willing candidates can nonetheless survive by virtue of the provision of Section 402 (c) that an election will be set aside only if the violation "may have affected" its outcome. The second is whether in a suit to enforce Title IV the Secretary may allege violations not recited—either explicitly or implicitly—in the internal protest of the union member or the complaint filed with the Department of Labor which triggered the proceeding. Both questions (which we submit should be answered in the affirmative) have been briefed and argued to the Court in cases now awaiting decision. *Wirtz* v. *Local 153,* No. 57, this Term; *Wirtz* v. *Local Union No. 125,* No. 58, this Term. We urge their plenary consideration in the instant case only in the event that the Court fails to decide them in the other cases.

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[5] The figure of 1182 is computed by subtracting from the 1725 names estimated by the union to have been eligible to run in 1965 543 names from the union's list of members eligible by virtue of their Assembly service (App. 79a–83a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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